



# Wisconsin Elections Commission

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January 5, 2021

Sherry Seaman  
3569 Sand Pit Road  
Oshkosh, WI 54904

Carey Carley, Clerk  
Town of Omro  
4205 Rivermoor Road  
Omro, WI 54963

**Sent via email to:**

[mechanicalserviceswi@live.com](mailto:mechanicalserviceswi@live.com) and [clerk@townofomro.us](mailto:clerk@townofomro.us)

Re: In the Matter of: Sherry Seaman et al. v. Brian Noe et al., Town of Omro  
Case No. EL 20-21

Dear Ms. Seaman and Ms. Carley:

This letter is in response to the verified complaint filed by Sherry Seaman with the Wisconsin Elections Commission (“Commission”), which was filed in response to actions taken by election officials at the Omro Town Hall voting location during the October 20, 2020, Recall Election. The complaint alleges that the elections officials violated Ms. Seaman and others’ rights under Wisconsin Statutes pertaining to public records, election-related threats, false election-related representations, violations pertaining to notice requirements, conflicts of interest, electioneering, absentee ballot tampering, certification/publication issues, and various other allegations in the context of these primary complaints. Ms. Seaman thereafter forwarded, or WEC separately received, complaints and statements from several other parties.

The Commission has reviewed Ms. Seaman’s consolidated complaints, Omro’s reply, the complainants’ responses, and all supporting documentation. The Commission provides the following analysis and decision. In short, the Commission finds that the Town of Omro did not violate elections laws pertaining to the claims listed above and below, with the exception of a violation of election notice requirements (not taking into account considerations of impossibility or statutory conflict/ambiguity).

**Complaint Allegations and Response**

Ms. Seaman filed a complaint with the Commission pursuant to Wis. Stat. § 5.06 alleging that the Town of Omro violated the applicable sections of law in Wisconsin Statute Chapters 5, 10, 12, and 19, and other laws relating to elections and election campaigns.

*Commissioners*

Ann S. Jacobs, chair | Marge Bostelmann | Julie M. Glancey | Dean Knudson | Robert Spindell | Mark L. Thomsen

*Administrator*  
Meagan Wolfe

The complaint specifically alleges that Ms. Seaman was denied access to a mailing list containing the names and addresses of Town of Omro residents. There is some factual debate over whether, or to what extent, this list exists. It is additionally alleged that the document should have been released, and that Seaman's campaign would have benefitted from its use.

A barrage of suspected threats, intimidation, control, and harassment are further alleged. This includes Chairman Noe exercising control over the action of town employees, Treasurer Jackson and her husband harassing the complainant (*e.g.* entering the complainants property and taking photographs, etc.), Clerk Carley systematically trying to undermine the complainant's campaign (*e.g.* denying access to records, failing in certain duties, etc.), various individuals publishing or otherwise making "defamatory" statements, family and friends of Noe harassing via social media and other means, retaliation for taking legal action against the town and improper disclosure of such information, etc.

The complainants also allege further elections deficiencies related to statutory notice requirements, conflicts of interest, electioneering, ballot tampering, elections certification, and illegal direction from legal advisors. The respondents categorically deny all such allegations.

#### Commission Authority and Role in Resolving Complaints Filed Under Wis. Stat. § 5.06

Under Wis. Stat. §§ 5.05(1)(e) and 5.06(6), the Commission is provided with the inherent, general, and specific authority to consider the submissions of the parties to a complaint and to issue findings. In instances where no material facts appear to be in dispute, the Commission may summarily issue a decision and provide that decision to the affected parties. This letter serves as the Commission's final decision regarding the issues raised by Ms. Seaman's complaint.

The Commission's role in resolving verified complaints filed under Wis. Stat. § 5.06, which challenge the decisions or actions of local election officials, is to determine whether a local official acted contrary to applicable election laws or abused their discretion in administering applicable election laws.

#### Commission Findings

##### *Required Initial Analysis on the Definition of an "Election Official"*

First, it is important to assess whether the various parties are "election officials" as defined by Wisconsin law. Wisconsin Statute § 5.02(4e) defines "election official" as "...an individual who is charged with any duties relating to the conduct of an election." This definition seems fairly expansive on its face. At times, an expansive interpretation may be warranted (*i.e.* someone other than a clerk, election inspector, or voting deputy may have a consistent and substantive role in the conduct of an election). As the respondents' analysis implies, though, the complainants' definition of "election official" is too broad.

For example, Chairman Noe was required by law to recuse himself from electoral processes as a candidate in this recall election (his alleged non-recusal is addressed later). This required recusal, the fact that his job does not entail many duties relating to the "conduct of elections," and the detail found in supportive statutes all suggest that Chairman Noe was not an election official in the sense required by Wis. Stat. § 5.06(1).

Perhaps the most significant consideration when analyzing the definition of "election official," as found in Wis. Stat. § 5.02(4e), comes by incorporating related statutes into the analysis.

Wisconsin Statutes, Chapter 7 (“ELECTION OFFICIALS; BOARDS; SELECTION AND DUTIES; CANVASSING”), deals extensively with “elections officials” and related matters. For instance, the section on compensation of elections officials and trainees provides that “a reasonable daily compensation shall be paid to each inspector, voting machine custodian, automatic tabulating equipment technician, member of a board of canvassers, messenger, and tabulator who is employed and performing duties under chs. 5 to 12.” Wis. Stat. § 7.03(1). This section obviously deals only with compensated election officials and trainees, but it provides instrumental clarity on Chapters 5 and 12 as well.

This is not to say that only the compensated elections officials and trainees under this section meet the statutory definition of Wis. Stat. § 5.02(4e). The many sections of Chapter 7 further detail the responsibilities of other “elections officials” (*e.g.* elections commissions, commissioners, clerks, special voting deputies, etc.).

Beyond these specific actors, the likelihood of an individual being classified as an “elections official” significantly decreases. The respondents’ contention that Chairman Noe, Treasurer Jackson, Attorney Marone, and various other individuals linked to them (*e.g.* family members, friends, etc.) are viable parties to a Wis. Stat. § 5.06 is thus rejected, despite any fleeting or minimal ties they may have to electoral processes.

Those parties will be largely removed from the analysis below for this reason. This removal should not be considered a judgment on the merits of any other civil, criminal, and/or administrative actions the complainants may otherwise pursue.

#### *Public Records Claims (e.g. Voter Address Lists)*

The Commission is not an arbiter of public records disputes. Under Wisconsin Statutes, the consolidated complainants had but two remedies (Wis. Stat. § 19.37(1)):

- 1) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.
- 2) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

Seeking these remedies in a timely fashion may have permitted the complainant, candidate to utilize the requested records for campaign-related purposes, provided such a list exists. The existence of such a list remains a factual dispute that is not required to be resolved in the instant matter.

#### *Alleged Threats Against the Complainant*

A litany of allegations and responses were put forth by all parties involved in this matter. Much of this falls under First Amendment free speech rights, the common types of rancor that occur during a contentious campaign, and other activities typical of municipal politics. Many of the claims are not substantiated by sufficient or actionable evidence in the record, or necessary legal citations. As such, the Commission will confine its assessment below to specifics alleged in the

record. Several components of the complaint may warrant additional investigation or consideration, but a Wis. Stat. § 5.06 complaint is not the appropriate forum for any remaining claims of threats and harassment. The Commission does not disregard such behavior if it amounts to a violation of election law or otherwise adversely impedes fair electoral processes, and accordingly, every other component of the complaints and responses with thus be analyzed in the later sections of this decision.

Additionally, several parties have been deemed not to meet the statutory definition of an “election official.” It is important to remember that these parties represented the substantive portions of the complaints alleging threats and harassment.

Other potentially impactful allegations are made without sufficient evidence at this time, or they require investigatory resources/authority that the Commission does not possess (*e.g.* it is not within the Commission’s purview to determine matters of criminal trespass, criminal harassment, defamation, etc., even if the alleged perpetrators of those actions remained a party to this complaint, which they do not). While many of the Commission’s findings do not favor the complainants in the instant matter, this decision does not in any way prohibit the complainants from pursuing other criminal or civil options with personal counsel or the local district attorney’s offices. In most instances, that would be the more appropriate venue for the claims brought here.

#### *False Representations Affecting Elections*

Chairman Noe is not an “election official” subject to a Wis. Stat. § 5.06 complaint. Regardless, the record does not present sufficient evidence that false representations affecting an election were made or that the respondents prompted/directed certain social media activity in a way that caused such an outcome.

#### *Election Notices*

The election notices sections of the complaints, response, and replies were the most ripe for review and potential action by the Commission. There is valid cause for concern presented in the many complaints on this issue, specifically that the election notice requirements of Wis. Stat. § 10.06(3)(f) were not met. It seems very likely that the 40-day requirement for posting of the Type A notice was not met.

Despite respondent emails in the record stating that notice was published in the newspaper earlier than the record supports, possibly by accident, it seems likely that this did not happen in a timely manner. An independent search of online newspaper postings by the Commission did not establish a record of earlier publications of the Type A notice (*i.e.* the first newspaper publication may have been in the Omro Herald on September 24, 2020, rather than the initially-reported postings in the Oshkosh Northwestern).

Additionally, the Town of Omro has a local newspaper, so the respondents could not utilize three notices in lieu of newspaper publication as detailed in Wis. Stat. § 10.05. Wisconsin Statute § 10.05 also provides that, “Whenever the manner of giving notice is changed by the governing body, the body shall give notice of the change in the manner used before the change. Whenever posting is used, the notices shall be posted no later than the day prescribed by law for publication, or if that day falls within the week preceding the election to be noticed, at least one

week before the election.” As such, the prior discontinuation of posting sites such as the Town of Omro Dump soften the respondents’ arguments that those posting sites were correct.

There is one problematic consideration when examining this area of elections law in the context of the larger legal and statutory landscape. Wisconsin Statute § 9.10(4)(d) provides, “Promptly upon receipt of a certificate under par. (a), the governing body, school board, or board of election commissioners shall call a recall election. The recall election shall be held on the Tuesday of the 6th week commencing after the date on which the certificate is filed, except that if Tuesday is a legal holiday the recall election shall be held on the first day after Tuesday which is not a legal holiday.”

This means a recall election, under the best of circumstances, will be held 42 days after the petition certificate is filed. A recall election may be scheduled inside of 40 days under certain factual scenarios. This challenge is rendered even more difficult when considering how few clerks and officials have a great deal of experience with recall elections processes, thus requiring additional preparation time and consultation with outside parties. The statutes create a complication, if not an impossibility, when municipalities are attempting to marry up statutory notice deadlines with the statutory recall deadline.

Clerk Carley attempted to counteract these timing deficiencies by completing a variety of additional steps (*e.g.* letters to the citizenry, postings on social media, postings in local web-based news sources, physical postings at several locations, use of the town website (even if it was temporarily rendered out of service), etc.). These steps, when taken in conjunction with other evidence presented by the respondents (*e.g.* the number of absentee ballots cast, etc.), highlight that the Town of Omro took reasonable steps to offset a challenging timeline.

Under an ideal fact set, Wis. Stat. § 5.06 provides the Commission with rather limited recourse when a respondent has violated elections laws. The Commission may, “...by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law.” Wis. Stat. § 5.06(6). The fact set in the instant matter is by no means clear cut.

In theory, a violation of statutory notice requirements did occur. However, compliance under the best of statutory recall circumstances is challenging, if not impossible. It is hereby ordered by the Commission that the Town of Omro assess what could have been done differently, and conform future notice activity to the law, where such conformance is feasible. All necessary steps should be taken with regard to future elections, and all forms of notice should be conducted in a more timely manner (*e.g.* letter to the citizenry providing notice of the upcoming election and absentee voting deadlines).

It is also important to note, if the complainants find this response insufficient, that Chairman Noe’s current term expires in April of 2021. The election taking place in several months is just as likely to serve as a referendum on the Chairman’s actions/performance as the order of a new recall election would be. Beyond these considerations, the respondents’ brief provides other valid legal arguments as to why the violations here were not as impactful as alleged, and why the election should not be reconducted.

### *Conflicts of Interest*

There is inadequate evidence in the record to show that Inspector Dvorachek was conflicted through any meaningful association with Chairman Noe. Regardless of that fact, the sworn affidavits of Inspector Dvorachek, Inspector Gardner, and Clerk Carley all detail that Inspector Dvorachek voluntarily recused herself from the role of Chief Elections Inspector, due to the potential for a claim of conflict of interest. No meaningful evidence was provided as proof that such a recusal did not happen, or that the three sworn statements were given falsely. It is hereby determined by the Commission that no conflict of interest thus occurred.

### *Electioneering at the Polling Place on Election Day*

The Commission previously determined that Chairperson Noe is not an “elections official” as required for a Wis. Stat. § 5.06 claim. That said, an alleged violation of Chapter 12 is an important allegation, meriting review in many circumstances. Any such claim against Chairperson Noe would, however, be more appropriate in another venue (*e.g.* referral to the local district attorney). Despite this, the Commission will examine the evidence in the record below.

Even the partial removal of Chairman Noe from the equation would not excuse any alleged wrongdoing by elections inspectors who may have ignored improper behavior in the polling place. The respondents again offer three written, sworn affidavits stating that Omro elections officials did not observe any electioneering, nor were there reports to them at that time. The complainants’ evidence is not as compelling, and much of it is based upon third-party statements and hearsay not formally offered into the record.

Many complainant witnesses and associated statements were referenced to by the complainants themselves, and at best, contact information was provided for the witnesses. This alleged evidence would have been better offered into the record as formally sworn testimony. The Commission thereby dismisses the claim of electioneering in the polling place.

Disregarding that decision for a moment, at a minimum, Chairperson Noe would do well to in future elections to exercise his right to vote and vacate the polling places expeditiously. Conversations and town business can generally be conducted at another time/location.

### *Tampering with Absentee Ballots and Other Alleged Irregularities*

There is no sufficient evidence in the record to prove that absentee ballots were tampered with in violation of state elections laws. This claim is largely reliant on the observations of Mr. Brian Seaman, the husband of Complainant Sherry Seaman, who served as an election observer on that day. All parties are apparently in agreement that Observer Seaman did not formally challenge those ballots at the time. This is not totally fatal to the claim, but he also did not make any other efforts to confirm compliance with elections law (*e.g.* attempt to lawfully take photographic evidence of the envelopes with the permission of the chief inspector, contact law enforcement, etc.).

Additionally, the respondents again provide three written, sworn affidavits countering the contention that ballots were illegally tampered with. The Commission thus dismisses the claim of ballot tampering.

*Certification/Publication of Election Results*

The respondents provided evidence of certification in the exhibits attached to their response brief. The complainants did not subsequently focus on this component in their final replies. The Commission finds that the respondents did comply with statutory certification and publication requirements.

*Town Attorney Improperly Directed the County Clerk to Refrain from Communicating with Complainant Seaman*

It has previously been discussed that Attorney Marone is not an election official as required for a Wis. Stat. § 5.06 claim. There is also insufficient evidence in the record to suggest that this direction, if accurately described here, was “improper” (e.g. was this a lawful suggestion based on the litigation risk posed by Complainant Seaman and certain information Clerk Ertmer possessed, was it only an attempt to ensure all municipal election information came from a single municipal source, etc.). It is unclear from the record that an illegal or improper order was given, or that Clerk Ertmer shirked any duty she may have had, even if she listened to such an order.

Beyond this, the record provides abundant evidence that Clerk Ertmer was providing ample assistance to the Town of Omro, and thus not denying “valuable advise [sic] from an experienced clerk who had been involved in many elections in the past.” The record is littered with correspondence between Clerk Ertmer and the Commission/officials regarding proper electoral processes. This claim is thus dismissed by the Commission.

Commission Decision

Based upon the above review and analysis, the Commission finds that the Town of Omro did not substantively violate elections laws. All claims are hereby dismissed, with the exception of a violation of election notice requirements. That violation is mitigated by considerations of impossibility and/or statutory conflict/ambiguity).

Right to Appeal – Circuit Court

This letter constitutes the Commission’s resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission’s decision, please feel free to contact me.

Sincerely,

COMMISSION



Megan Wolfe  
Administrator

cc: Commission Members

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